NO. 02-608

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, Ph.D., Warden S.C.I. Camp Hill; THE DISTRICT ATTORNEY OF PHILADELPHIA, Lynn Abraham; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Mike Fisher,

Petitioners,

v.

GERALD EVERETT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY

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ARGUMENT IN REPLY

Petitioners offer the following brief argument in reply to Everett's response to the Petition for Writ of *Certiorari*.

I. This Court should grant the writ to reaffirm that the deferential standard of 28 U.S.C. § 2254(d) applies even where the state courts do not explicitly refer to federal authority.

After the petition in this case was filed, this Court issued two opinions demonstrating beyond doubt that the Third Circuit was wrong to apply *de novo* review to Everett's ineffectiveness claim. First, in Early v. Packer, 123 S. Ct. 362 (November 4, 2002), the Court held that state courts need not cite to federal authority to qualify for deferential review under the current federal habeas statute, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996, ("AEDPA"). The statute "does not require citation of our cases -- indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state court decision contradicts them." 123 S. Ct. at 365 (emphasis in original). Second, in Woodford v. Visciotti, 123 S. Ct. 357, 359 (November 4, 2002), this Court held that the California Supreme Court's "occasional shorthand reference" to the ineffectiveness standard -- a reference that may have been imprecise -- did not render its decision unworthy of deference. On the contrary, the question is whether the state court's decision is *inconsistent* with this Court's precedent, not whether the state decision contains any particular language or citation. The Court also warned federal courts against a "readiness to attribute error" to state

courts as a vehicle to engage in *de novo* review. 123 S. Ct. at 360.

The opinion below is worse than those reversed in Early and Packer. In those cases, the Ninth Circuit analyzed how the AEDPA standard should be applied. Here, the Third Circuit refused to apply the AEDPA standard at all. The court below used its federal citation requirement to presume that the Pennsylvania courts *entirely ignored* Everett's federal ineffectiveness claim. But this presumption is inconsistent with this Court's contrary "presumption that state courts know and follow the law." Woodford, 123 S. Ct. at 360. It is also flatly inconsistent with the Pennsylvania Supreme Court's repeated and emphatic statements that the Pennsylvania ineffectiveness requirement is *one and the same* as Strickland v. Washington, 466 U.S. 668 (1984). See, e.g., Commonwealth v. Pierce, 527 A.2d 973, 976-77 (Pa. 1987). Petition at 13-14.

Although the principles of Early and Woodford demonstrate that the Third Circuit was wrong, this Court should not simply remand for reconsideration in light of those two new cases. The Third Circuit may be tempted to avoid Early and Woodford by requiring the state courts to be more specific in *identifying* a federal claim than in *rejecting* it. This Court should affirm that the state courts need not cite a particular federal case, or recite specific language, in order to "adjudicate" a federal claim within the meaning of the federal habeas statute. 28 U.S.C. § 2254(d).

There is no good argument supporting the Third Circuit's approach, and Everett identifies none in his response. He argues that the Pennsylvania courts actually rejected his claim on retroactivity grounds, rather than the

merits of his ineffectiveness claim. Response at 14. This is an entirely new justification for the Third Circuit's *de novo* approach -- it certainly did not occur to the Third Circuit. Nor has Everett ever made this particular argument before.

The problem with Everett's new argument is that the Pennsylvania courts *did* reject his ineffectiveness claim on the merits. The trial judge on collateral review cited to a number of ineffectiveness cases -- including Strickland -- and concluded that "trial counsel cannot be held to be ineffective for failing to raise an issue which was not the law at the time." App. 63. On appeal, the Pennsylvania Superior Court engaged in the same analysis -- first it described the ineffectiveness standard at length (with many citations), and then it cited Commonwealth v. Beasley, 678 A.2d 773 (Pa. 1996), for the proposition that "counsel cannot be found ineffective for failing to raise a meritless objection at time of trial or for failing to predict legal developments." App. 59.

This is routine ineffectiveness analysis -- the very same analysis this Court described in Lockhart v. Fretwell, 506 U.S. 364, 372 (1993) (trial counsel cannot be held ineffective for failing to make objection based on future legal developments). The state court decisions are not merely consistent with this principle -- they followed it.

That the Pennsylvania courts also cited to Commonwealth v. Gillespie, 516 A.2d 1180 (Pa. 1986), for the proposition that new rules of law should not be retroactively applied to older cases, does not change the meaning of their ineffectiveness analysis, or render AEDPA irrelevant. The non-retroactivity rule is animated by the same principle as the Lockhart rule: Old cases should not be subject to endless second-guessing based on later changes in

the law. Indeed, in Lockart itself, this Court referenced the non-retroactivity rule and noted its similarity to the rule of "contemporary assessment" of counsel's conduct under Strickland. 506 U.S. at 372-73.

Much of Everett's response to the Petition for Writ of *Certiorari* is devoted to his argument that the state courts wrongly assessed the state of Pennsylvania law at the time of his trial. Respondents disagree. In any event, this is irrelevant. The only question here is whether the Pennsylvania courts' analysis was consistent with this Court's precedent, and it clearly was. The Pennsylvania courts rejected respondent's ineffectiveness claim because these judges did not believe his trial counsel was constitutionally obligated to predict future legal developments. This analysis is the same as that described in Lockhart; it is *clearly* entitled to deference. For the reasons given in the petition, it was also the correct decision.

II. The Third Circuit's Decision Is Important, Because It Would Require *De Novo* Review in Hundreds of Pennsylvania Cases.

Everett argues that this Court should not grant *certiorari* because the opinion below has been "narrowly construed" and "is not ... the law of this Circuit." Response at 18.

Petitioners are not sure what Everett means. The decision below is indeed "the law of this Circuit" until it is overruled or abrogated. It is an important decision because it would require *de novo* review of all ineffectiveness claims arising out of Pennsylvania courts, where those courts cited state cases rather than explicitly refer to federal authority. As

explained in the petition, this is common practice in Pennsylvania, because the state courts have held time and time again that the state and federal ineffectiveness standards are the same; thus, citation to federal cases would be redundant. Petition at 13-14.

Everett refers to several recent cases in his effort to persuade this Court that the Third Circuit did not really mean what it said in the opinion below, and there is no danger of it being widely applied. He is entirely wrong. In the months since the opinion was issued, the opinion below has been strengthened and explained in several subsequent decisions.

In Marshall v. Hendricks, 307 F.3d 36 (3d Cir. 2002), the Third Circuit explored the decision below and made it even worse. The Marshall court explained that *de novo* review had been required in Everett's case because the Pennsylvania courts applied an "incorrect" ineffectiveness standard. Id. at 69 n.18. But the Third Circuit has never explained why the Pennsylvania standard is "incorrect." Rather, it is the same as Strickland, a fact that the Third Circuit once recognized. Werts v. Vaughn, 228 F.3d 178, 203-04 (3d Cir. 2000), cert. denied, 532 U.S. 980 (2001). In any event, if the Pennsylvania standard is truly "incorrect," that does not mean that the AEDPA standard should be ignored. Instead, the federal courts can hold that Pennsylvania ineffectiveness law is "contrary to" Strickland. At least that would provide the Commonwealth, and the state courts, with an explanation of the problem.

As it is, the Third Circuit's position makes little sense: Pennsylvania applies an "incorrect" version of Strickland, even though the state court judges *believe* they are applying Strickland correctly; although the Third Circuit has not

explained what the "error" is, it is apparently so egregious that it is not simply a misapplication of Strickland, but is tantamount to an entirely different standard which apparently cannot be reconciled with this Court's precedent. This is not a convincing reason for ignoring the AEDPA standard. It is also unfair to the state courts and their efforts to apply federal law.

Everett also cites Chadwick v. Janecka, 312 F.3d 597 (2002), and Hunterson v. DiSabato, 308 F.3d 236 (2002), in support of his argument that the opinion below has been narrowly applied. But neither Chadwick nor Hunterson was even an ineffectiveness case. (Hunterson was a collateral attack on parole revocation in New Jersey, while Chadwick involved a civil contempt order that has resulted in Chadwick's imprisonment for seven years.) The holding below remains undisturbed: Where Pennsylvania courts do not cite federal ineffectiveness cases, these claims will be reviewed *de novo* in federal habeas.

The opinion below is clearly incorrect; it is also important. Pennsylvania habeas petitioners now commonly cite this case while claiming entitlement to *de novo* review of their ineffectiveness claims. This Court should grant *certiorari* to reaffirm that the federal courts must apply a deferential standard of review to rejection of ineffectiveness claims by Pennsylvania courts.

CONCLUSION

For the reasons set forth above, as well as the reasons given in their initial brief, petitioners respectfully request that this Court grant the petition for writ of *certiorari*.

Respectfully submitted,

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